IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1089

DR. MILTON MARGOLES, M.D.,

Petitioner,

VS.

ALIDA JOHNS and THE JOURNAL COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

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Contrary to Respondents' assertion that this case presents "no important question of law requiring decision by this Court," (Respondents' brief, p. 11) this Court has stated, in *Societe Internationale v. Rogers*, that "certainly substantial constitutional questions are provoked" by the striking of a complaint for noncompliance with a pre-trial production order. 357 U.S. at 210.

So, too, is it specious for Respondents to urge upon this Court that "there is no conflict of decisions" (Respondents' brief, p. 11). The glaring reality of this case is that the holdings below under which the Petitioner has been denied

a trial on the merits, are completely out of line with the entire body of reported Fed. R. Civ. P. 37 cases. Respondents cite *NO* cases to answer questions 1, 2, and 3 in the Petition.

There is additional constitutional significance to this case, warranting review by this Court. Several of Respondents' arguments challenge basic objectives of the Federal Rules of Civil Procedure as well as fundamental concepts of due process which have become integral parts of Rule 37 case law and authority. For example, Petitioner's second question to this Court, concerning a district court's initial consideration of lesser, but equally effective sanctions (as dismissal): this issue has not been considered by this Court, nor, as Respondents claim, was it "clearly defined" in *Societe Internationale* (Respondents' brief, p. 15). The underlying principle for this widely accepted approach is that courts should impose *just* penalties, "the severity to be proportioned to the degree of recalcitrance and the prejudice to the other party,"[1] and that the courts

> "...should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior." *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir., 1970)

1. Professor Maurice Rosenberg, 58 *Columbia Law Review* at 492 (1958)

Consistent with this policy, in *National Hockey League v. Metropolitan Hockey Club*, 49 L. Ed. 2d 747 (1976), this Court found dismissal to have been proper where the district court was considering for the second time, sanctions for substantial discovery noncompliance after no fewer than five missed deadlines and three warnings of possible dismissal. In contrast, when the district court in this case first considered Rule 37 sanctions on Jan. 5, 1976, there already had been full compliance with its first production deadline, six weeks prior--and without any warning by the court of possible sanctions. Not only was dismissal under the circumstances of this case unnecessary, but such extreme action contradicts several primary objectives of the Federal Rules of Civil Procedure:

> "Undoubtedly all forms of discovery evasion could be stamped out by stern enough penalties, such as ruthlessly decreed forfeiture of a claim or defense for any type of evasion. Effective as that harsh course might be in eliminating recusance, no one would seriously recommend it. Not only would it burden the courts in every case of discovery default, but it would frustrate *THE BASIC OBJECTIVE OF DECIDING CASES ON THEIR MERITS*...'The courts...have deemed it better to withhold the thunderbolt on condition of future compliance than to foreclose a determination of the matter on the merits.'" (58

Columbia Law Review at 483, 495; 1958; emphasis added)

"Discovery...operates(s) in a procedural system designed to eliminate the plethora of technical motions and victories based on technical errors existing under the earlier practice. Yet if transgressions at pre-trial stages can lead to the imposition of a drastic sanction at each instance of noncompliance, the advantages of the system can become lost in a barrage of cross-motions for dismissal following each technical error in the hope of an easy victory without reaching the merits."[2] (72 *Yale Law Journal* at 828, 1963)

2. Respondents' implicit "all-or-nothing" policy ignores the greater flexibility in the selection of sanctions which was intended with the adoption of the 1970 amendments to Rule 37. In particular, Respondents' brief omits any mention of the newly added Rule 37 (b) (2) (C) sanction providing for assessment against a party and/or his *counsel*, of expenses, including attorneys' fees (App. A, p. 2a)--which would have been an appropriate alternative in the instant case. Were, as Respondents contend, the strict identification of lawyer and client in *Link v. Wabash*, 370 U.S. 626 (1962) for failure to prosecute under Rule 41, applicable to discovery sanctions (Respondents' brief, p. 20), the draftsmen would not have incorporated this new sanction into Rule 37. Further, Respondents' reliance on *Link* here is misplaced, because the district court--on the basis of misinformation (Petition, p. 13, 31)--dismissed this case for Petitioner's wilful disobedience of its discovery order, not for his counsel's negligence. (Tr., 42)

Petitioner submits that Respondents' pressing for dismissal after Petitioner's full discovery compliance, was just such a ploy. This becomes apparent through the misapplication to this case of the rationalization of *deterrence* from the dissimilar factual situation in *National Hockey League* (Respondents' brief, p. 16). What lesson should the holdings below in this case convey to *deter* others: That a party becomes seriously ill (prior to a discovery deadline), is hospitalized, has surgery, and subsequently suffers a heart attack at peril of being found to be flouting a court's authority? That the occurrence of personal adversity which a party did not cause and over which he has no control or choice except to attempt to cope with as best he can, shall be deemed to constitute such bad faith as shall deny him his day in court? That a party asking his attorney to notify a court of such severe personal hardship and to request a rescheduling of proceedings may be considered as intentionally disobeying a court's order?

Respondents' arguments justifying dismissal in this case also are inconsistent with the prerequisites which this Court historically has established for discovery noncompliance dismissals. Tracing this Court's decisions on this point from *Hovey v. Eliot* (167 U.S. 409; 1897)

through *Societe Internationale*, the *Harvard Law Review* observed that the construction this Court has placed on Rule 37 (b),

> "clearly indicates that a dismissal of the complaint or a default judgment for failure to comply with a discovery order would be improper unless the circumstances of the noncompliance afford a reasonable basis to presume an admission of want of merit in the claim or defense." (74 *Harvard Law Review* at 990; 1961)

In this light, dismissal of Petitioner's complaint--notwithstanding prior full production compliance--becomes constitutionally untenable, as must be the denial by the district court of an evidentiary hearing requested by the Petitioner to exonerate his conduct with respect to the court's discovery order. In other Rule 37 dismissals, courts have discerned "the true flavor of the case"--where refusals to appear or failures to produce documents; evasions; and dilatory tactics have made it apparent that the defaulting parties were attempting to disclose as little as possible which might be harmful to their cases, had no valid cases, and were but "delaying the inevitable," e.g., *Diapulse Corporation of America v. Curtis Publishing Co.*, 374 F.2d 442 (2d Cir., 1967), *Von Der Heydt v. Kennedy*, 299 F.2d 459 (C.A., D.C., 1962). Here, however, the roles of the parties are reversed,

and it has been the movants/Respondents who have preferred to snipe at the Petitioner's good faith from the safe distance of affidavits. Respondents' brief to this Court is demonstrative. In it, they attack the credibility of Petitioner's illness and personal hardships, but they opposed the district court examining the Petitioner's hospital/medical records and his son's diaries which would have been the best evidence of whether the Petitioner and his son actually were unable to comply timely with the court's Aug. 15, 1975, order. Similarly, footnote #7 at page 8 of Respondents' brief lists a number of items tardily produced. But this Court, like the district court, cannot know whether--as Petitioner sought to demonstrate at a hearing--this same information previously had been given to the Respondents; and whether the tardy production of these papers, in fact, had prejudiced Respondents' case. By the Respondents never setting forth exactly what documents they had received timely, the district court, in dismissing this case, had no idea how substantial had been Petitioner's prior production of documents.

Under the circumstances of this case, without holding the requested evidentiary hearing, the district court could not reasonably conclude in accordance with the above-mentioned constitutional

prerequisites for dismissal under *Societe Internationale* and other decisions of this Court, that the delay in compliance indicated any lack of merit in Petitioner's case instead of bona fide serious personal hardship and illness. The fact alone of full production of documents is inconsistent with such a conclusion. Unlike the posture of *Link v. Wabash* when it came to this Court, the findings of the district court here cannot be said to be supportable by a *COMPLETE* record of *ALL* the circumstances the Petitioner sought to bring to the attention of the district court. See 370 U.S. at 634-635.

Having avoided an evidentiary hearing, Respondents continue to cloud the issues. For example, in an effort to demean the seriousness and disability of the Petitioner's illness prior to the production deadline, the Respondents note that Petitioner's surgery in late October, 1975, was "well after the fact" (Respondents' brief, p. 14). Put in its proper context, the Petitioner remained largely disabled at home until he went to the Mayo Clinic on Oct. 15, 1975--which was the earliest available appointment (R., 179, 362). That this illness and surgery were not reported in Perry's Nov. 17, 1975, affidavit in opposition to the motion to dismiss, occurred because Petitioner's previous counsel--not Perry--drafted the

affidavit. Counsel had not prepared these papers prior to the deadline. They had to be filed immediately, and Perry did not have the opportunity to redraft the affidavit to fully report what had transpired. Indeed, this very point was made as part of Perry's request for a hearing at which to clarify the record (R. 366), because the district court had dismissed the case without knowledge of the Petitioner's illness prior to its Sept. 19, 1975, production deadline. In this respect, the basis for Petitioner's request for a hearing was hardly "repetitive and cumulative" (Respondents' brief, p. 19). That not all of Perry's facts and documents were contained in his affidavits in support of the hearing, was due to his not being able to fully prepare his case because of the sudden change in priorities in the weeks following his father's heart attack. Also, the purpose of Perry's affidavits was to indicate that the motion to vacate judgment was being made in good faith, and he expressly wrote the court that he intended to introduce important documents at the hearing which were not in the record. (R., 371, 374)

In conclusion, there have been many cases in which, for a variety of reasons, delays in compliance or noncompliance with discovery orders have occurred. This case is constitutionally significant because of the convergence of several

distinct, fundamental issues of due process, any of which should have exculpated the Petitioner from the drastic sanction of dismissal of his case. The lower courts' failures to follow applicable decisions of this Court, their misapplication of another, and conflicts of authority on other related issues, present this Petition as a suitable case for this Court both to further define due process requirements in the exercise of discovery sanctions, and to harmonize conflicting Rule 37 policy considerations.

Respectfully submitted,

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